IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8125 OF 2004

Motilal Sukhu Jaiswal,)
Age - 58 years, since deceased)
by heirs and legal representatives)

1) Smt.Rukmani Motilal Jaiswal,)
2) Shri Hiralal Motilal Jaiswal,)
3) Shri Sanjay Motilal Jaiswal,)
4) Shri Vinod Motilal Jaiswal,)
5) Shri Pannalal Motilal Jaiswal,)
6) Smt.Sunita Motilal Jaiswal,)
7) Surekha D/o.Motilal Jaiswal,)
8) Anil Motilal Jaiswal,)
9) Ganesh Motilal Jaiswal,)
All Inhabitants, at present)
residing at Hut No.GN 41 1/2,)
Masjid Galli,Opp.Mhatre Pen Co.,)
Bhavani Shankar Road,)
Bhikha Seth Wadi, Dadar,)
Mumbai - 400 028.).. Petitioners
(Org.Respondents/
Defendants)

Versus

1. Vithal Anna Sonavane,)
2. Mrs.Laxmi Vithal Sonavane,)
residing at Room No.44,)
Sitaram Bhagoji Baithi Chawl,)
Masjid Galli, Bhikha Seth Wadi,)
Opp.Bhavani Shankar Road,)
Dadar, Mumbai - 400 028.)..Respondents
(Org.Appellants/
Plaintiffs)

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Shri A.V.Anturkar, Advocate, with Shri Ajit C.Shah for the petitioners.

Shri K.A.Shah with Smt.Sheela R. Rao for respondents.

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CORAM : R.M.S.KHANDEPARKAR, J

DATED : 19th OCTOBER, 2004.

ORAL JUDGMENT :

1. Heard the learned advocates for the petitioners and the respondents.

2. Rule. By consent, the rule is made returnable forthwith.

3. The lower appellate Court by the impugned order dated 13th August, 2004 has disposed of the entire Appeal No.586 of 1998 while disposing the application filed by the respondents for production of additional documents being the certified copies of the proceedings in Suit No.3494 of 1977 filed by the petitioner herein (now deceased) against the Bombay Municipal Corporation in the City Civil Court.

4 While assailing the impugned order, the learned advocate appearing for the petitioner has submitted that the respondents had neither made out any case under Clause (aa) of Rule 27 of Order 41 of the Code of Civil Procedure, nor the impugned order discloses any justification for exercise of the powers by the lower appellate Court in terms of clause (b) of

the said Rule while permitting the respondents to produce the additional evidence. He has further submitted that merely because the documents sought to be produced by the respondents could affect the decision in the suit that by itself cannot be a justification for exercise of powers under Order 41 Rule 27 of the Code of Civil Procedure by the lower appellate Court. He has also submitted that mere difficulty in arriving at an appropriate decision on the basis of the existing materials on record would also not justify the order allowing the parties to the appeal to produce additional evidence after the conclusion of the trial. It is further case of the petitioners that, while deciding the application under Order 41 Rule 27, the lower appellate Court without considering the issues raised in the appeal has disposed of the entire appeal itself, and has remanded the matter even granting liberty to the parties to amend the pleadings, with direction to the trial Court to decide the suit afresh. According to the learned advocate for the petitioner, apart from the fact that the impugned order is a non-speaking order, the interference by the lower appellate Court in the judgment and decree of the trial Court is without any justification, besides being in breach of the procedure prescribed under the Code. Reliance is

sought to be placed in the decisions in the matter of **Mrs.Indira Bhalchandra Gokhale (deceased by L.Rs.) v. Union of India & Anr.,** reported in AIR 1990 Bom. 98, of **Ramprasad Haripal v. Manohar Vithoba,** reported in AIR 1959 Bom. 300, **Sonabai w/o. Sawlaram v. Gotiram Nathu & Ors.,** reported in AIR 1956 Bom.160 as well as in the matter of **Mahavir Singh & Ors. v. Naresh Chandra & Anr.,** reported in 2001(1) SCC 309 in support of the above submissions.

5. On the other hand, the learned advocate appearing for the respondents, while justifying the impugned order, has submitted that the application which was filed under Order 41 Rule 27 of the Code of Civil Procedure has been allowed in exercise of the powers under Clause (b) of the said Rule 27 and not under Clause (aa) thereof. According to the learned advocate for the respondents, the lower appellate Court having found that the documents in question being the relevant documents, and being directly related to the controversy in the suit between the parties, the same being necessary for an appropriate decision in the matter, the respondents have been allowed to produce the same in evidence in exercise of the powers under clause (b). According to the learned advocate, the said documents would definitely affect

the decision in the suit and the lower appellate Court has therefore simultaneously set aside the judgment and decree of the trial Court and remanded the matter giving ample opportunity to both the parties to lead evidence in the matter, and therefore, it cannot be said that there is any prejudice caused to the petitioners on account of the impugned order, nor it can be said that the lower appellate Court has exercised its discretion arbitrarily. Drawing attention to the copy of the application filed under Order 41 Rule 27, the learned advocate for the respondents has submitted that it apparently discloses that the respondents did not possess the said documents prior to the disposal of the suit and the same having come in possession of the respondents after disposal of the suit, and the same having direct effect on the findings to be arrived at by the trial Court on the relevant issues in the matter, the lower appellate Court is justified in allowing the said application. Once the lower appellate Court had arrived at the finding about the necessity of the said documents for just and proper decision in the matter, there was no point in adjudicating upon the rival contentions sought to be raised in the appeal, and therefore, the lower appellate Court was justified in setting aside the judgment of the trial Court and

remanding the matter.

6. Undoubtedly, the application filed by the respondents under Order 41 Rule 27 discloses certain facts of which the lower appellate Court has also taken note while passing the impugned order. It was disclosed in paragraph 4 of the said application that the respondents had stated in the course of evidence before the trial Court that the petitioner in a suit filed in the City Civil Court at Mumbai had admitted that he was the tenant of the respondents. However, at the time of deposition before the trial Court, the respondents did not know the number of the suit which was filed by the petitioner against the B.M.C. wherein he had admitted that he was tenant of the respondents. It has been further stated that the respondents were under the impression that such admission was made in a suit bearing Suit No.4862 of 1986 though they did not have any evidence in that regard at the relevant time.

7. The respondents have also stated therein that they could not get the certified copy of the said proceedings, and the papers pertaining to the Suit No.4862 of 1985 were misplaced and were not traceable, inspite of their sincere efforts to search them out.

In paragraph 5 of the said application, it was stated that after the judgment was delivered by the trial Court, the respondents were able to trace out some of the papers in Suit No.4862 of 1985 and thereafter they got the certified copy of the said proceedings. Further, though there was a reference to the BMC suit in the said proceedings, it did not disclose number of the said suit. They therefore made inquiries with the BMC office and ascertained the number of the said suit being Suit being No.3494 of 1977 which was filed by the petitioners in the City Civil Court at Mumbai against the BMC and thereafter the respondents obtained the certified copy of the same. The application for certified copy was filed on 19th November, 1998 and the copy was obtained on 22nd November, 1998. Undisputedly, the trial Court had disposed of the suit on 31st July, 1998. The application under Order 41 Rule 27 was filed in the month of August, 2003.

8. Order 41 Rule 27 of the Code of Civil Procedure forms part of the procedural law in relation to the exercise of power of the appellate Court under Section 107 of the Code of Civil Procedure, while dealing with the appeals filed before it. Section 107(1)(d) empowers the appellate Court to take

additional evidence or to require such evidence to be taken subject to such conditions or limitations, as are prescribed in that regard. Order 41 Rule 27(1) deals with the circumstances under which the additional evidence, either oral or documentary, can be allowed to be produced on record by the appellate Court during the pendency of the appeal. Since the learned advocate for the respondents has not disputed that the impugned order cannot fall under clause (aa) of sub-rule (1) of Rule 27 of Order 41, it is not necessary to consider the matter with reference to the said clause, and suffice to observe that the impugned order has not been passed in exercise of the powers under the said clause. Even otherwise, it cannot fall under the said clause as it was never the case of the respondents that inspite of the due diligence, the certified copy of the proceedings in the Suit No.3494 of 1977 could not be obtained by them nor it was their case that they had any knowledge about such proceedings, during the pendency of the suit. On the contrary, the contention in the application under Order 41 Rule 27 was specifically to the effect that the respondents had knowledge about the relevant documents but they could not remember the number of the said suit. It was not the case of the respondents that they had made any attempt to ascertain such

number in the office of the B.M.C. prior to the disposal of the suit. On the contrary, specific plea is to the effect that after the delivery of the judgment by the trial Court, they made inquiries with the B.M.C. In other words, apart from the fact that they did not remember the number of the said suit, they were fully aware of the proceedings, much prior to the disposal of the suit, yet there is no explanation as to what prevented the respondents from inquiring about the number of the suit from the BMC office at the relevant time. Being so, as fairly submitted by the learned advocate for the respondents, the matter could not have been dealt with under Clause (aa) of the Sub-rule (1) of Rule 27 of Order 41 of the Code of Civil Procedure.

9. As regards the clause (b) of Rule 27(1) of Order 41, it clearly provides that the additional evidence can be allowed if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce it or for any other substantial cause. In other words, such evidence can be allowed on two grounds, viz. when the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce the judgment, and secondly it could be for

any other substantial cause. Before understanding as to what could be other substantial cause, it is necessary to take note of sub-rule (2) of Rule 27 which provides that "whenever the additional evidence is allowed to be produced by the Appellate Court, the Court shall record the reason for its admission. Eventually, the Order under 41 Rule 27 has to be a reasoned order, apart from the fact that it should reveal "substantial cause" for allowing the parties to lead additional evidence. Obviously, substantial cause has to be in relation to the additional evidence sought to be produced at the appellate stage. It is also pertinent to note that the expression "substantial cause" is preceded by the word "other" and the entire expression "other substantial cause" forms part of the clause (b) which primararily speaks of necessity of additional evidence to the appellate Court to enable it to pronounce the judgment. Being so, while considering the scope of the expression "other substantial cause", the said expression cannot be understood ignoring the purpose behind the provision of law empowering the Appellate Court to allow the parties to lead additional evidence at the appellate stage. It would, therefore, mean that any such "substantial cause" has to relate to the exercise of powers by the appellate Court primararily for the

purpose of enabling the Appellate court to pronounce the judgment at the appellate stage, and it cannot relate to the matters at the original stage i.e. before the trial Court. In other words, the additional evidence must be necessary for imparting just and proper justice in the appeal while dealing with the rival contentions of the parties in relation to the judgment under the appeal, and it need not relate to the requirement thereof to the trial Court to decide the suit as such.

10. Undisputedly, the documents which are sought to be produced by way of additional evidence relate to the issue No.3 which was framed by the trial Court which reads that "Whether the plaintiffs prove that they are the landlords of the suit premises". In other words, the respondents/ plaintiffs were put on complete guard by the trial court about the necessity to prove relationship between the parties as that of the landlord and the tenant and the burden in that regard was upon the respondents/plaintiffs. The lower appellate Court also has considered this aspect in paragraph 18 of the impugned judgment wherein it has been observed that "the vital point in the present matter is whether the said evidence is material or not to decide the issue of the landlord and tenant between

the parties. It has been held that "the proposed evidence would definitely affect the decision in the suit and therefore, this decision deserves to be set aside." In other words, considering the fact that the burden was upon the respondents to establish their claim of being the landlords and the petitioner being the tenant in respect of the suit premises, the said document forms a relevant piece of evidence and it would definitely affect the decision on the said issue and that therefore the application was required to be allowed. The Appellate Court has obviously sought to allow such document on the ground that the same could be of assistance to the trial Court to decide the said issue otherwise than as was decided by the trial Court. It is, therefore, apparent that the exercise of powers under Order 41 Rule 27 can, by no stretch of imagination, be held to be under the impugned order for the benefit of the lower appellate Court to pass the judgment in the appeal. It is essentially to enable the trial Court to arrive at a finding different from the one which had been already arrived at in relation to the issue No.3 in the matter. Eventually, therefore, the impugned order cannot be said to have been passed in exercise of jurisdiction under Order 41 Rule 27(1)(b) of the Code of Civil Procedure.

11. It may appear that allowing such evidence to assist the trial Court to decide the relevant issue in the matter on the basis of such additional evidence would be covered by the expression "substantial cause". However, as already stated above, substantial cause has to be in relation to the matter before the appellate Court in order to assist the appellate Court to decide the matter in a just and proper manner or in relation to any incidental issue arising at the appellate stage but it cannot be in relation to the matters at the original stage. As regards the additional evidence which could be allowed at the original stage, the provisions comprised under clauses (a) and (aa) are required to be satisfied. Clause (b) is entirely in relation to the matters at the appellate stage. The respondents were fully aware of the alleged fact that there was admission on the part of the petitioners in a suit filed in the City Civil Court by the petitioners against the B.M.C. about they being the tenants of the respondents and only thing which the respondents could not remember during the pendency of the suit was the number of such suit. Undisputedly, apart from trying to lay their hands on some other proceedings wherein there was reference to such suit by the petitioners against the B.M.C., no

efforts were made by the respondents to ascertain the number of such suit, neither there were any efforts made to inquire in the office of the B.M.C. as regards the number of the said suit. If the document is of such a relevancy to the respondents, certainly the respondents ought to have taken appropriate steps to produce the documents in the course of trial before the trial Court. No explanation is forthcoming in the application nor the Appellate Court has referred to any other material which could disclose any explanation in that regard by the respondents. Being so, a valuable right which had accrued in favour of the petitioners to challenge the decree passed by the trial court is sought to be taken away at the appellate stage by filling up the lacuna in the evidence by the respondents by seeking to produce additional evidence. Certainly, assisting one of the parties to fill up the lacuna detrimental to the right already accrued in favour of the opposite party can never be said to be for a "substantial cause" within the meaning of the said expression under clause (b) of Sub-rule (1) of Rule 27 of Order 41 of the Code of Civil Procedure, 1908.

12. The Apex Court in **Mahavir Singh's case (supra)** has clearly held that the expression "to enable it to

pronounce the judgment" as used in Order 41 Rule 27(b) of the Code of Civil Procedure relates to the ability to pronounce the judgment and it is to be understood as the ability to pronounce a judgment satisfactory to the mind of the court delivering it. In other words, it relates to the judgment by the appellate Court. It has further been held in the said judgment that "it is only in the circumstances when the appellate Court requires such evidence to pronounce the judgment the necessity to adduce additional evidence would arise and not in any other circumstances."

13. In **Sonabai Sawlaram's case (supra)**, the learned Single Judge of this Court while dealing with the powers under Order 41 Rule 27 has observed that if a party has had an opportunity of leading evidence and has negligently failed to avail himself of that opportunity, he cannot claim another opportunity to be given to him to lead evidence. It was further held that when on account of lack of evidence the suit has been dismissed, the appellate Court cannot remand the suit to the trial Court to give the plaintiff another opportunity to prove his claim in the suit.

14. In **Ramprasad Harimpal's case (supra)**, it was held that there was nothing before the lower appellate

Court which would show that the lower appellate Court had found that there was some lacuna in the case, for removal of which, it considered it necessary to admit additional evidence nor was there anything on record to show that the lower Appellate Court found it impossible to decide any point in controversy between the parties solely on the basis of the material before it and that it therefore wanted some additional evidence on that point. It was also ruled that merely saying that it thought it necessary to admit the documents is not enough. It must further specify the points to which the evidence is to be confined. Undoubtedly, as rightly submitted by the learned advocate for the petitioners, the impugned order in that regard is totally a non-speaking order. Apart from referring to the point in the matter being related to the issue of the landlord and tenant and the proposed evidence would affect the decision in the suit, no reason as contemplated under Sub-rule (2) of Rule 27 of Order 41 has been disclosed in the impugned order. Merely saying that the proposed evidence would definitely affect the decision can, by no stretch of imagination, be said to be a justifiable reason for allowing the party to lead additional evidence at the appellate stage.

15. The learned Single Judge of this Court in **Mrs.Indira Bhalchandra Gokhale's case (supra),** has held that "Order 41 Rule 27 is not to be taken recourse to merely because a party at the stage of appeal finds that some material could have tilted the decision in its favour has not been produced but should have been."

16. It is also to be noted that once a party is allowed to lead additional evidence in exercise of the power under Order 41 Rule 27, the appellate Court should not ignore the provisions of Order 41 Rule 28 which clearly speak of the mode of taking additional evidence. When the Code specifically prescribes a mode for taking additional evidence which can be allowed in exercise of the power under Section 107(1)(d) read with Order 41 Rule 27 of the Code of Civil Procedure, it is necessary for the appellate Court to adhere to the said procedure unless the circumstances of the case warrant departure therefrom, and the justification for such departure being revealed from the order itself. Rule 28 clearly provides that "wherever additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate

Court, to take such evidence and to send it when taken to the Appellate Court." In other words, merely because a party is allowed to lead additional evidence in exercise of powers under Order 41 Rule 27 of Code of Civil Procedure, that by itself would not entitle the appellate Court to set aside the judgment of the trial Court and remand the matter for further or fresh trial in the matter. In such a case, the Appellate Court has to allow the party to lead only that evidence which has been permitted to place on record in the form of additional evidence and the question of ordering further or fresh trial in such circumstances merely because the document may affect the ultimate decision does not arise at all. Besides, once such evidence is permitted to be led, the Appellate Court has either to direct the lower Court to record the evidence or it can itself take and consider such evidence along with all the evidence on the record while considering the decree under challenge in appeal.

17. The power for remand of the matter by the Appellate Court is the subject matter of Rule 23 and Rule 23A of Order 41. In terms of Rule 23, "where the Court from whose decree an appeal is preferred has disposed of the suit upon a preliminary point and the

decree is reversed in appeal, the Appellate Court may, if it thinks fit, by order remand the case, and may further direct what issue or issues shall be tried in the case so remanded, and shall send a copy of its judgment and order to the Court from whose decree the appeal is preferred, with directions to re-admit the suit under its original number in the register of civil suits, and proceed to determine the suit; and the evidence (if any) recorded during the original trial shall, subject to all just exceptions, be evidence during the trial after remand." Eventually, the Rule 23 speaks of remand only in cases of suits disposed on preliminary issues. As regards the remand in other cases, the Rule 23A provides that "where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under Rule 23." Obviously, in case where the decree passed by the trial Court is reversed in appeal and a re-trial is considered necessary, certainly the Appellate Court can remand the matter to the trial Court. However, while making the order of remand, it is necessary for the Appellate Court to deal with the judgment which is impugned in the appeal and arrive at the conclusion

regarding the necessity for re-trial. Unless the Appellate Court arrives at the finding about the necessity for re-trial, the question of remanding the matter for fresh trial cannot arise in that regard. Needless to say that such finding has to be passed in the judgment in due compliance of the provisions of law comprised under Order 41 Rule 31 of the Code of Civil Procedure. In other words, before arriving at the finding about the necessity of re-trial, the Appellate Court has to consider the point which is canvassed against the decree under challenge in the appeal and to arrive at the necessary finding in that regard by complying the provisions comprised under Order 41 Rule 31 of the Code of Civil Procedure and then follow the procedure prescribed under Rule 23A of Order 41 of the Code of Civil Procedure. The impugned order nowhere discloses any such exercise having been done by the Appellate court. On that count also, the impugned order cannot be sustained.

18. It is also necessary for the Appellate Court while disposing the appeal to reveal from its judgment that the parties were heard on merits before disposing the appeal. It is not sufficient merely to reproduce the expression like "heard", but it has to be essentially disclosed from the analysis by the

Appellate court of the materials on record with reference to the points for determination which arise in the appeal. The impugned order nowhere discloses any such exercise having been done by the lower Appellate Court in the case in hand while disposing the appeal.

19. For the reasons stated above, neither the order allowing the party to lead additional evidence can be sustained, nor the disposal of the appeal by the impugned order. Hence, the impugned order needs to be quashed and set aside and the matter is required to be remanded to the Lower Appellate Court to decide the matter in accordance with the provisions of law bearing in mind the observations made hereinabove. Accordingly, the impugned order is hereby quashed and set aside and the matter is remanded to the lower Appellate Court to decide the same in accordance with the provisions of law, bearing in mind the observations made hereinabove, after hearing the parties. The Rule is made absolute in above terms with no order as to costs.

20. Authenticated copy may be given to the parties.